

STATE OF MICHIGAN
COURT OF APPEALS

JAMES ZBORIL,

Plaintiff-Appellant/Cross-Appellee,

v

GERALDINE FARKUS,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

March 1, 2005

No. 250760

Oakland Circuit Court

LC No. 1996-535946-CK

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). Defendant cross-appeals as of right, challenging the provision of the same order denying her request for sanctions and costs. We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a grant of summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under the wrongful conduct rule, claims by a plaintiff are generally barred if they are based on conduct by the plaintiff that is "prohibited or almost entirely prohibited under a penal or criminal statute." *Orzel v Scott Drug Co*, 449 Mich 550, 561; 537 NW2d 208 (1995).

The ruling by the trial court and defendant's position on appeal are premised on the conclusion that the stock purchase alleged by plaintiff, i.e., that he gave money to defendant to buy Patterson Dental stock at an employee discount rate with the intent that defendant would later transfer the stock to plaintiff, was inherently wrongful and fraudulent. We reject this premise. Even assuming that plaintiff knew the stock was bought by defendant at a discounted price not available to the general public, this does not establish that plaintiff engaged in any dishonest conduct, let alone that he committed or intended to commit the crime of false pretenses under MCL 750.218.

By the plain language of MCL 750.218(1), both as in effect at the time that plaintiff gave defendant money to buy the stock and under the amended version presently in effect, an actor must have an intent to defraud or cheat to be guilty of false pretenses in violation of MCL 750.218. See *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001), quoting *In re People v Jory*, 443 Mich 403, 412; 505 NW2d 228 (1993) (articulating "use of the false representation

with an intent to deceive” as an element of false pretenses). Contrary to the implication of the trial court’s opinion, it is not evident that plaintiff had an intent to deceive or cheat anyone with regard to the present matter. There is no evidence in the record or allegation by defendant that Patterson Dental conditioned the stock offering on the employee agreeing not to transfer ownership of the stock to another party or purchase stock for a third party. Nor is there any evidence or allegation that plaintiff knew of any such restriction assuming one existed. Further, there is no evidence or allegation of a false representation to Patterson Dental (or any party) with regard to defendant’s purchase of the stock because she bought the stock as an employee of Patterson Dental at a time that she was such an employee.

Defendant was entitled to buy the stock based on her status as a company employee. There is no allegation that Patterson Dental restricted defendant from transferring the stock to a third party after she bought it. Thus, there is no basis for the trial court’s conclusion that the contemplated transaction alleged by plaintiff violated or was intended to violate MCL 750.218. Accordingly, the trial court erred by granting summary disposition in favor of defendant based on the wrongful conduct rule.

Next, defendant suggests plaintiff’s conduct violated MCL 750.280, which defines as a crime the commission “of any gross fraud or cheat at common law.” However, for the reasons discussed, there is no basis to conclude that plaintiff engaged in any “gross fraud or cheat” because there was no evidence or allegation of any fraudulent or dishonest conduct with regard to the agreement between the parties alleged by plaintiff.

Defendant also refers to the doctrine of unclean hands. First, this doctrine is applicable only to the extent that plaintiff seeks equitable relief. *Rose v National Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002). But, in any event, the doctrine of unclean hands bars a party from obtaining equitable relief with regard to a matter in which it has engaged in conduct tainted by inequitableness or bad faith. *Id.* However, as indicated above, there is simply no evidence or allegation to support a conclusion that plaintiff engaged in such conduct with regard to his alleged agreement with defendant. Thus, there is no basis to conclude that any of plaintiff’s claims are barred by the doctrine of unclean hands.

Defendant’s argument on cross-appeal that the trial court improperly denied her request for costs and attorney fees is premised on the trial court having properly granted summary disposition in her favor. Given our conclusion that the trial court erred in granting summary disposition in her favor, she is not entitled to costs and attorney fees.

Reversed and remanded for further proceedings on plaintiff’s complaint. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Janet T. Neff